APPEAL NO. 022013
FILED SEPTEMBER 27, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 23, 2002. The hearing officer determined that the respondent/cross-appellant (claimant) sustained a repetitive trauma injury as defined by the 1989 Act; that the claimant had disability from _____, through the date of the CCH; that the date of the claimed injury is (alleged date of injury); that the claimant first reported the claimed injury to her employer on _____, which is more than 30 days after the date of the injury and good cause for failing to timely notify the employer does not exist; that the appellant/cross-respondent (carrier) is relieved from liability under Section 409.002, because the claimant failed to timely notify the employer pursuant to Section 409.001. The hearing officer found that although the claimant was unable to work beginning on _____, she did not have disability because the injury was not compensable.

The carrier appealed the hearing officer's determinations that the claimant sustained a repetitive trauma injury as defined by the 1989 Act and that due to the claimed injury she was unable to obtain or retain employment at wages equivalent to her preinjury wage beginning on _____, and continuing through the date of the CCH. The file does not contain a response from the claimant.

The claimant cross-appealed the hearing officer's determinations that the date of the claimed injury is (alleged date of injury); that the claimant failed to timely report the claimed injury to her employer within 30 days and no good cause exists for her failure to do so; that the carrier is relieved from liability under Section 409.002, because the claimant failed to timely notify the employer pursuant to Section 409.001; that because the carrier is relieved from liability on the basis of late notice of the claimed injury, the claimant did not sustain a compensable repetitive trauma injury; and that because the claimant did not sustain a compensable repetitive trauma injury, she did not have disability. The carrier responded, urging affirmance.

DECISION

Affirmed on the occurrence of an occupational disease; reversed and rendered on the date of injury and untimely notice.

The claimant testified as to the repetitive nature of her job duties with her employer. She stated that for approximately one month prior to _____, she had experienced intermittent discomfort in her hands; that she was not concerned about the condition because the symptoms always went away and she attributed it to being tired and working too hard; that on _____, her right hand "locked up" and caused her to be unable to perform her job; and that she reported the injury to her employer that same day and sought treatment at the emergency room (ER). In

evidence are records from the ER dated _____. The ER records indicate that the claimant reported having intermittent upper extremity pain for one month and that she denied any trauma. Also in evidence was an initial report from the claimant's treating doctor, a chiropractor, dated February 12, 2002. His report indicates that the claimant gave a history at her February 8, 2002, examination of having "mild symptoms" from repetitive stress for two months; however, this same report documented an "incident" on _____, in which she experienced right arm pain and went to the ER. The claimant denied telling the treating doctor she had been having symptoms for two months. He diagnosed cervical problems and carpal tunnel syndrome (CTS). Nerve conduction studies were positive for problems in some respects, normal in others. A consulting M.D. found CTS and bilateral hand and wrist strain. The claimant presented evidence that her hand condition caused her to be unable to work.

OCCURRENCE OF A REPETITIVE TRAUMA INJURY

We first address the issues of repetitive trauma injury and the claimant's inability to obtain and retain employment at wages equivalent to her preinjury wage as a result of the claimed repetitive trauma injury beginning on _____, and continuing through the date of the CCH. An occupational disease includes a repetitive trauma injury. Section 401.011(34). Section 401.011(36) defines a "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." There is conflicting evidence on the issue of whether the claimant sustained a repetitive trauma injury and that the injury resulted in the claimant's inability to obtain or retain employment at wages equivalent to her preinjury wage. Claimant's testimony and the medical reports in evidence support the hearing officer's determinations on both issues. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision that the claimant sustained a repetitive trauma injury in the course and scope of her employment and that as a result the claimant had an inability to obtain or retain employment at wages equivalent to her preinjury wages is supported by sufficient evidence.

DATE OF INJURY

We next address the issue of the date of injury. Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. In Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994, the Appeals Panel stated:

> Unlike the case of a specific injury, the date of injury in the 1989 Act for purposes of a repetitive trauma/occupational disease is "the date on which the employee knew, or should have known, that the disease may be related to the employment." Section 408.007 [emphasis added]. Clearly, this standard is not as precise as a specific incident. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definitive diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury. [Texas Workers' Compensation Commission Appeal No. 992486, decided December 29, 1999.]

The Texas Supreme Court offered guidance for evaluating the date of injury for an occupational disease in Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 853 (Tex. 1980), stated:

> Many diseases do not fit neatly within an either/or distribution, and the dispute whether such a condition is compensable or not is an ongoing one. Uncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them.

Although he acknowledges that outcome is a “harsh result,” the hearing officer states that the “law compels” him to find that the claimant knew or should have known no later than (alleged date of injury), that her upper extremity symptoms constituted “an injury” may be related to her employment and he concluded that the date of injury is (alleged date of injury). We agree that this was error. The Workers’ Compensation law is to be liberally construed in favor of the injured worker. Albertson’s v. Sinclair, 984 S.W.2d 958 (Tex. 1999). In this case, the (alleged date of injury), date, a specific date nowhere mentioned in the evidence, is apparently based upon the treating doctor’s notation that she first felt “mild symptoms” two months before the date of his examination (a statement denied by the claimant).

To interpret the definition of date of injury for an occupational disease to be the date of the first symptom is a strict, not liberal, construction of the law. The determination of (alleged date of injury), derived from notes indicating the approximate time of a first symptom, is against the great weight and preponderance of the evidence in this case as to be manifestly unfair or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We consequently reverse the hearing officer's decision that the date of injury is _____. The only other date suggested by the evidence as to when the claimant first knew she had an injury, and that it may be related to her employment,

was _____, the day she experienced pain to a degree that caused her not to be able to work and sent her to the ER. We accordingly render a decision that the date of injury as defined in Section 408.007 is _____.

NOTICE OF INJURY

With regard to the issue of timely notice of injury to employer, Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

Based upon the rendered _____, date of injury, the claimant's report to her employer that day was timely. We reverse the hearing officer's decision that the claimant did not give timely notice of injury to employer and we render a decision that the claimant did give timely notice of injury to her employer and the carrier is not discharged from liability.

We observe that the hearing officer included no discussion to support the finding that the claimant did not have good cause. Even with a (alleged date of injury), date of injury, the record would certainly support a determination of "trivialization" of the claimant's symptoms until such point as they dramatically caused an inability to perform the tasks of the job. *See* Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991.

The hearing officer's decisions that the claimant sustained a repetitive trauma injury while in the course and scope of her employment with employer, and that the injury caused her to have an inability to obtain or retain employment at wages equivalent to her preinjury wage are affirmed. We reverse the hearing officer's decision that the date of injury was (alleged date of injury), and we render a new decision that the date of injury was _____. We reverse the hearing officer's decision that the claimant did not give timely notice of injury to her employer and we render a new decision that the claimant gave timely notice of injury to her employer and that the carrier is not relieved of liability under Section 409.002. Because the injury is compensable, the claimant had disability beginning _____, through the date of the CCH. The carrier is hereby ordered to pay applicable medical and income benefits in accordance with the 1989 Act and this decision.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

_____
Elaine M. Chaney
Appeals Judge